No. 14588

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant and Cross-Appellee,

vs.

ADOLPH G. SUTRO,

Appellee and Cross-Appellant.

ANSWERING AND REPLY BRIEF OF APPELLANT AND CROSS-APPELLEE.

LAUGHLIN E. WATERS,
United States Attorney,
MAX F. DEUTZ,
Assistant U. S. Attorney
Chief of Civil Division,
MARVIN ZINMAN,
Assistant U. S. Attorney,
600 Federal Building,
Los Angeles 12, California,
Attorneys for Appellant and Cross-Appellee.

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plaintiff in an action brought by him for damages allegedly caused by the negligence of defendant's employees while acting within the scope of their employment. [R. 4, 9-11.] Jurisdiction to entertain the action was conferred upon the District Court by 28 U. S. C., Sec. 1346(b) (which section is a part of that Act commonly known as the Federal Tort Claims Act). Jurisdiction to entertain this appeal is conferred upon this Court by 28 U. S. C., Sec. 1291. Defendant's Notice of Appeal from the Judgment appealed from was filed on September 23, 1954.

Questions Presented.

1. Whether a party purchasing land in 1946, who decides not to improve that land until 1952 because of a polluted water supply during that period, may recover against the party causing the pollution for:

   (a) the difference in the cost of effecting the improvements in 1946 and 1952.

   (b) the difference in the 1946 and 1952 purchase price of certain tools and equipment which the land purchaser might have purchased in 1946, but did not because of the polluted water supply.

2. Whether the District Court erred in the amount of its award for plaintiff's loss of rental value for the period 1946-1952 because of the pollution.

3. Whether the District Court erred in excluding evidence of expenses allegedly incurred by plaintiff in what plaintiff chooses to call an effort to mitigate damages.

Summary of Argument.

The District Court properly refused to allow a recovery for the increased cost of effecting certain improvements upon this land because such an item under the circumstances and facts surrounding this case is too far removed and unrelated to the defendant's tort and is otherwise speculative in nature. The District Court's award with respect to loss of rental was correct and is supported by the evidence adduced at the trial of the action. No error was committed by the District Court in excluding evidence offered by the plaintiff relating to expenses incurred by him in what he calls an effort to mitigate damages. These expenses could not properly be recoverable in the action and hence, the evidence as to them was properly excluded as being immaterial.

ARGUMENT.

I.

Recovery Should Not Be Allowed in This Case for Increased Costs.

1. No Authority Known to Defendant Supports Any Recovery in This Case for Increased Costs.

In its opening brief as appellant, defendant attacked that portion of the District Court's award allowing the plaintiff a recovery based upon the increased cost of building a repair shop, implement shed, help house and storage shed. Defendant's position in making that attack was that recovery for an item such as increased building costs was improper because that item was remote, speculative and too far removed from the defendant's tort. For these same reasons defendant takes the position in its answering brief that the District Court correctly refused to allow recovery for the other items for which recovery was sought.

Defendant could find no case in California or elsewhere dealing with the precise question of whether or not recovery can be had for an item such as increased costs in a tort case involving these or similar facts. The general rules applicable in California and elsewhere are however well established. They are that while a party should be compensated or made whole for his loss, no recovery should be had for damage not proximately caused by the tort-feasor or for any damage which may be classed as remote or speculative.

Calif. Civ. Code, Sec. 3333;

Wells v. Lloyd, et al., 6 Cal. 2d 70, 56 P. 2d 517 (1936);

Ramsey v. Penry, 53 Cal. App. 2d 773, 128 P. 2d 399 (1942);

25 C. J. S., Damages, Secs. 17, 18 and 26.

Plaintiff relies upon *California Orange Co. v. Riverside Portland Cement Co.,* 50 Cal. App. 522, 195 Pac. 694 (1920), as justifying that portion of the award heretofore challenged by defendant. (Pltf. Op. Br. p. 17.) However, an analysis of the facts of that case show no similarities to the factual basis upon which plaintiff seeks to recover for increased costs in this case.

The cement case was a tort action by an orange grower against a cement company which, by emitting dust from its plant injured the grower's trees and caused a decrease in crop yield. A recovery was allowed in that case for the (1) loss of crops; (2) for increased labor to care for the land because of the dust; and (3) for injuries to the trees. In that case the grower, as the injured party, had property at the outset which was damaged, *i. e.,* the trees. In so far as increased costs in this case are concerned, plaintiff had no property to start with. In that case the defendant acted so as to injure that which existed. Plaintiff here could have built at will and could have purchased equipment at his pleasure without interference from the defendant. The recovery in that case was based upon acts which had already been completed and as to which there was no conjecture and little speculation. A recovery here based upon increased building costs and the increased cost of equipment would be based upon little more than the plaintiff's statements as to what he would have done had the time been ripe for him to do so. In the cement case there was a direct causal relation between the tortfeasor's acts and the injury for which recovery was al-

lowed. Here, as to increased costs at least, there is no such relationship. Defendants polluted a stream, the water from which could have been used by plaintiff to irrigate crops. This water was indeed lost to the plaintiff by the tortious conduct of the defendant and because of that the value of plaintiff's land was at least temporarily decreased. Defendant has no quarrel with a recovery for loss in the value of the land during the period of pollution, but defendant should not be made to pay because plaintiff chose not to carry out his rather grandiose plans for improving this land.

2. Recovery Was Properly Disallowed for the Increased Cost of Erecting the Residence and Guest House and of Installing the Domestic Water Supply System and Sewage System.

Recovery for the increased cost in effecting these improvements was denied by the District Court on the ground that recovery for such an item would fall into the categories of uncertainty, remoteness, infeasibleness and unnecessary [R. 46]. No specific authority has been found for this conclusion. However, upon general principles of tort recovery it is correct and should be adopted by this Court.

Defendant's main ground of attack upon allowing any recovery based upon increased costs of effecting these improvements is founded on the legal concept of proximate cause. It is true that plaintiff may have desired to erect the buildings and install the systems when he purchased the land, and as plaintiff has pointed out, plans for the buildings prepared in 1946 were introduced into evidence [R. 354, 357]. However, that plaintiff did not go ahead in 1946 at a time of lower construction costs was not the

fault, in the legal sense, of the defendant. Had plaintiff wished to build in 1946, he could have done so without interference from the defendant. Defendant's activities did result in the pollution of the stream riparian to plaintiff's land. By reason thereof, the value of plaintiff's land for agricultural purposes was decreased. But that factor bears too little relation to the increased costs of effecting these improvements to permit recovery therefor in a tort action.

3. Recovery Was Properly Disallowed for the Increased Cost of Installing the Irrigation System.

As to this item the defendant takes the same position it has taken with respect to those items just mentioned, namely, that it was not the proximate or legal cause in this, a tort action of any increase in the cost of installing the same. There is an additional circumstance to be considered with respect to this item. That is, that although plaintiff may have desired to install the particular system for which he claims recovery in 1946, he had no plans and specifications prepared for its installation until 1953 [R. 147, 151, 155-156]. There is thus added to the problem of recovery for this item an element of speculation not to be found in dealing with the residence and guest house.

In order to properly consider this element of speculativeness, reference should be made to plaintiff's theory of recovery. It is that he would have installed this irrigation system in 1946 had the water not been polluted, but had to wait until 1952 because of the pollution and thereby is entitled to recover the difference in cost. Yet, admittedly (Pltf. Op. Br. p. 25), no plans were prepared for the irrigation system in 1946. All that any award

for this item could be based upon is plaintiff's testimony as to what he would have done. It is submitted that to allow recovery for this item would be to introduce into the law of damages an element of uncertainty and speculation not warranted either by precedent, principle or reason.

4. Recovery Was Properly Disallowed for the Increased Cost of Acquiring Tools.

Defendant was not the proximate cause of this item and because the only evidence that these specific tools would have been purchased in 1946 was a list prepared in 1953, too much speculation would be present in granting a recovery for any increases in cost.

Certainly there is less relation between the defendant's tort and this item than there is with respect to almost any of the other items for which the plaintiff seeks recovery. The fact that plaintiff is a man who all of his life has used tools and who has made inventive contributions to our society is certainly a fact of merit. But defendant fails to see how this fact can have any relevance on the question of proximate cause. It is inconceivable that the law should impose upon one who pollutes a stream riparian to agricultural land the increased cost of purchasing machine tools to be used in the furtherance of such inventive endeavors, no matter how meritorious the results therefrom might be. In addition, for the same reason applicable to the irrigation system, namely, that the list of tools was not prepared until 1953, there would be too much speculation inherent in permitting a recovery for such an item wholly apart from the question of whether or not the defendant was the proximate or legal cause of these price increases.

5. The District Court Properly Excluded Evidence as to the Increased Cost of the Erection of Fencing and the Acquisition of Certain Farm Machinery.

The District Court's theory as to what damages could be recoverable in this case is most adequately reflected at page 386 of the record:

> "The Court: Whatever he spent, whatever he has to spend now or after the nuisance was abated, in other words, after the water was not contaminated by this noxious affluent, if there is an increase in the cost of buildings that were necessary to do the job, I think the additional cost over the estimate which he has as indicated by the plans, drawings and specifications is the measure of damages in the case."

In all probability the District Court excluded evidence of the increased cost of fencing and of acquiring certain farm machinery because no plans, drawings or specifications for these items were prepared until 1953 [R. 363, 374]. Of course, on this appeal and at the trial of the action defendant has taken the position that no recovery can be had for any increased costs because defendant was not the proximate cause of these injuries, if such they be, and they are otherwise too speculative to permit of recovery. As to the excluded evidence now under discussion, however, the District Court and defendant do not disagree. Under the law, as found in the requirement of proximate cause and of certainty in the ascertainment of tort damages, no recovery may be had for items not made specific and definite until after the tort had ceased to exist. Therefore, such evidence, both under the theory of the District Court and of the defendant, is immaterial and hence was properly excluded in the Court below.

6. Because of the Nature of the Theory Upon Which Plaintiff Seeks to Recover, the Fact That the Stream Was Polluted and the Growing of Edible Vegetables Had Been Prohibited Before Plaintiff Purchased the Land, Should Be Considered as Going to the Question of Whether Any Recovery, Except for Decrease in Land Value, Should Be Allowed at All.

As mentioned by defendant in its opening brief (p. 8), there is nothing in the record now before this Court to show that the plaintiff had knowledge of the polluted condition of the stream before he purchased the land. In its opening brief defendant urged this Court to consider this circumstance because "it is inconceivable that a man of appellee's [plaintiff's] business experience and acumen would not know of these facts at the time he purchased the land. (Deft. Op. Br. p. 8.) Defendant no longer believes it necessary to ask this Court to indulge in an assumption because plaintiff has conceded that testimony elicited at the trial of this action, though not a part of the record now before this Court, established that plaintiff was aware of the stream pollution when he purchased the property. (Pltf. Op. Br. p. 13, footnote.)

This fact, *i. e.,* plaintiff's knowledge of pollution of the stream is material to the question of damages especially when the nature of plaintiff's theory of recovery is kept in mind. Put simply, plaintiff says he bought the land intending to farm it intensively and intending to use stream water to irrigate it with, and operate profitably, and because he couldn't do so he says he could not carry out his plans and should be reimbursed by the defendant. Yet he knew at the time he purchased the land that the stream was polluted, and in that condition could not be profitably used for irrigation purposes. Defendant submits that

plaintiff's intentions, in view of his knowledge of the pollution, were not reasonable and should not be allowed to form the basis for any recovery.

Plaintiff is apparently taking the position on this appeal that his knowledge of the polluted condition of the stream is not important because he did not know that a well on the land was polluted or would soon be so, and he intended to use water from this well for domestic purposes (Pltf. Op. Br. p. 13, footnote). Defendant fails to see the merit in this distinction, if one there be. The *very gravamen* of plaintiff's case seems to be that plaintiff could not use his land because the stream was polluted and yet he knew of this when purchasing the land. The relevance of the well condition is dim indeed.

II.

The District Court's Award With Respect to Loss in Rental Value Was Correct.

Defendant has conceded liability for loss in rental value in the amount awarded by the District Court, $18,918.36. That amount is correct. It is based upon and is well within the range of the well qualified expert who testified at the trial of the action [R. 541-552 (qualifications of Stanley E. Goode, Jr., defendant's farm valuation expert)].

1. The Acreage Figures Used by the District Court Were Correct.

Plaintiff's total land area was approximately 273 acres. Some of this was not capable of being irrigated with stream water but would best be devoted to "dry farming," *i. e.,* land dependent solely upon rain water for fertility, and much was not capable of growing crops at all [R.

567]. Of course plaintiff's claim properly relates only to that land which could be irrigated with stream water. Plaintiff claims that the District Court should have included 100 acres in this category instead of 82 (Pltf. Op. Br. p. 38). The award of the District Court, however, actually credits plaintiff for loss of rental of approximately 100 acres and not 82 [R. 45 reflects that the District Court awarded plaintiff for loss of rental as follows: 56.55 acres at $60.00 per acre, 25.80 acres at $40.00 per acre, and 18 acres at $10.00 per acre for a total of 100.35 acres]. Moreover, the award of $10.00 per acre for the 18 acres indicates that the alkali land was included by the District Court. In this connection it should be noted that there was testimony from which the District Court could have excluded this particular acreage from the award completely. This is so because defendant's expert testified that this 18 acres was really not affected by the pollution at all "since the land was best suited for wet pasture, and for that purpose would bring a rent of $10.00 per year under either condition" [R. 579-580]. By this it is undoubtedly meant that this particular land could have used even polluted water for pasturage purposes. It should also be pointed out that even the polluted water was good for some purposes such as the growing of crops by pre-irrigation, *i.e.,* irrigation before planting and for the watering of pasture land.

Plaintiff takes the position that 50 acres of this land which admittedly had never been irrigated before should have been included by the District Court in the irrigable classification at least for the years 1951 and 1952 because this 50 acres could have been irrigated by water from a well dug in 1950. It is submitted that the District Court

correctly refused to include these 50 acres because they had no relation to the defendant's tort and whether they could have been irrigated or not is subject to mere speculation and conjecture.

2. The Rental Value Per Acre Allowed by the District Court Was Adequate.

(a) The District Court Sitting as the Trier of Facts Was Justified in Accepting the Valuation Figures Testified to by Defendant's Expert, Stanley E. Goode.

It is apparent from a comparison of the District Court's award with respect to loss of rental value and the testimony of Mr. Goode [R. 540-649] that the District Court relied upon the figures testified to by Mr. Goode in the making of its award [R. 579-580]. No question is raised by plaintiff as to Mr. Goode's qualifications to testify as an expert in this field, and indeed no such question exists. The record contains ample evidence of his qualifications to do so [R. 541-552], and those qualifications remain unshaken after plaintiff's cross-examination of this witness [R. 597-617].

Plaintiff in his opening brief contends that the investigation made by Mr. Goode was so cursory that his testimony should not be credited, and instead should give way to the testimony of plaintiff's expert, Mr. Thomas Anderson, and of the plaintiff himself, admittedly not an expert in the field of land valuations. This contention is without merit. The investigation made by Mr. Goode was ample to permit him to testify and to have his testimony be given maximum weight [R. 553-579].

(b) The District Court as the Trier of Fact Was Justified in Rejecting the Valuation Figures Testified to by Plaintiff's Expert, Mr. Anderson, and by the Plaintiff Himself.

Defendant feels that this forum is not a proper one for the arguing of fact questions once decided by a trier of fact and supported by evidence brought about at the trial of the action. In this case the District Court has decided at what figure plaintiff's loss of rental value should be set. That figure was based upon the testimony of a competent expert, Mr. Goode. The District Court was at liberty to reject the testimony of plaintiff's expert, Mr. Anderson, and was entitled to reject the figures set by the plaintiff himself, who did not even qualify as an expert in a field where it seems that expert testimony should be required.

3. The District Court Correctly Deducted $8,711.64 From Plaintiff's Total Loss of Rental as Estimated Dry Crop Receipts.

An explanation of the reason for any deduction from the loss of rental value computed by the District Court appears to be in order. The District Court deducted this sum from the total loss of rental because that sum was its estimate of what the land should have brought in the way of rentals notwithstanding the pollution. Plaintiff contends that the amount of the deduction, $8,711.64 [R. 45], was too high because of what was apparently a mathematical error in the District Court's computation. Defendant submits, however, that there was evidence in the record permitting the Court below to deduct a much higher sum than that actually deducted, namely, the testimony of defendant's expert, Mr. Goode, as to other uses to which

the land could have been put, notwithstanding the pollution of the stream [R. 580]. Defendant thus submits that the sum deducted by the District Court represented a decision on a question of fact which should not now be disturbed.

III.

The District Court Properly Excluded Plaintiff's Offer of Evidence Regarding What Plaintiff Calls "An Effort to Mitigate Damages."

Defendant agrees with plaintiff that there exists a general principal in the law of damages under which legitimate expenses incurred in a reasonable effort to mitigate damages may be recovered against the wrongdoer. It should, however, be emphasized that these expenses must be legitimate and must be reasonable.

The District Court rejected an offer of evidence as to expenses allegedly incurred by plaintiff in what plaintiff chooses to call an "effort to mitigate damages" [R. 398-400]. Plaintiff submits that the offered evidence was properly rejected on the grounds of immateriality because the offered evidence if received would bear no relation to the defendant's tort in the causal sense, is highly speculative in other respects and may be properly described, as a matter of law, as not falling within the category of reasonable expenses incurred in a legitimate effort to mitigate damages.

In this connection plaintiff uses the phrase "no permanent benefit" apparently under the belief that whatever is spent resulting in no permanent benefit to the spender may be recovered. It is submitted that much more is needed beside "no permanent benefit" before one can recover under the theory of mitigation of damages.

Plaintiff, by attempting to introduce this evidence, sought to charge the defendant for such items as: depreciation of equipment, auto and truck maintenance, rental of equipment, fees for accountants and legal fees not connected with this litigation and insurance on the premises [R. 399]. It is submitted that the Court below properly rejected this evidence on the ground of immateriality.

Deserving of special mention is defendant's offer to prove that he expended $15,977.66 as traveling expenses [R. 399] which he now contends ought to have been allowed because it was money spent in an effort to mitigate damages. Standing alone, defendant fails to see the materiality of this evidence. It is well nigh inconceivable that a recovery of this sum would be permitted in a tort case where the gravamen is pollution of a stream. Nor is this particular aided by argument in plaintiff's brief, for no particular reference is made therein.

Conclusion.

The defendant admits liability for its negligence. It should not, however, be held liable for more than that for which it was responsible. The plaintiff no doubt had great plans for this land, but generally speaking, these plans were still within his own mind at all times herein material. The fact that these plans could not bear fruit should not be laid to the feet of the defendant by requiring of it the payment of money damages. Defendant has conceded liability for loss of rental value recognizing that plaintiff has suffered a real loss in this respect. The award of the District Court for loss of rental is adequate and does compensate plaintiff for all of the loss for which the law allows a recovery. Plaintiff is indeed a remarkable man who is capable of intelligent thought. This is indeed ad-

mirable. But when all we have is thought and no more, recovery must be allowed only for that capable of some objective measurement.

It is respectfully requested that the action of the District Court in allowing any recovery for increased costs be reversed, and that the action of the District Court in all other respects be affirmed.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,

MAX F. DEUTZ,
Assistant U. S. Attorney
Chief of Civil Division,

MARVIN ZINMAN,
Assistant U. S. Attorney,

Attorneys for Appellant and Cross-Appellee.